Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1999

Adelyn L. Luther,

Petitioner,

v.

Commissioner of Revenue,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Minnesota imposes an income tax on *all* of the income of individuals domiciled within the State. In general, it imposes an income tax on only the *Minnesota-source income* of individuals domiciled outside of Minnesota. However, nondomiciliaries who have an abode in Minnesota and spend over one-half of the year in Minnesota are taxed on *all* of their income, as if they were domiciled within the State.

The Petitioner, a domiciliary of Florida who maintained an abode within Minnesota, spent 171 full days within Minnesota and 176 full days outside of Minnesota. She spent 18 days travelling between Minnesota and other states. The Minnesota Supreme Court held that she spent over one-half of the year in Minnesota and sustained the imposition of a tax upon all of her income against Due Process and Commerce Clause challenges. The questions presented are:

1. Whether the Minnesota Supreme Court erred when it held that the Due Process Clause of the 14th Amendment of the United States Constitution was not violated by the imposition of a tax upon *all* of the income of a nondomiciliary individual, where a large portion of that income was derived from sources outside Minnesota, and where the individual spent more complete days outside Minnesota than she did within Minnesota?

2. Whether the Minnesota Supreme Court erred when it held that the Commerce Clause of the United States Constitution "is not implicated" by a challenge to Minnesota's scheme of nondomiciliary income taxation?

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The Petitioner respectfully asks that a writ of certiorari issue to review the judgment of the Minnesota Supreme Court entered in this case.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported at 588 N.W.2d 502, and is reprinted in the appendix hereto at App. A-1. The Minnesota Supreme Court affirmed the Minnesota Tax Court, whose decision is reprinted in the appendix hereto at App. A-21.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on March 15, 1999 and is reprinted in the appendix hereto at App. A-31. Jurisdiction to review that judgment by a Writ of Certiorari is provided in 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the 14th Amendment of the United States Constitution provides, in relevant part, that a State shall not "deprive any person of . . . property, without due process of law." The Commerce Clause of Section 8, Article I of the United States Constitution provides, in relevant part, that the "Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."

The relevant provisions of Minnesota law (Minn. Stat. § 290.01, subd. 7 (1990); § 290.06, subd. 22 (1990); § 290.17, subd. 1(1990), and § 290.17, subd. 2(c) (1990)) are set forth in the Appendix at App. A-33.

STATEMENT OF THE CASE

Mrs. Adelyn Luther (hereinafter "Mrs. Luther") has been domiciled in Florida since 1987. She owns a home in Florida. She also owns a house in Minnetonka, Minnesota (as well as in Montana and Hawaii). In the 1990 tax year at issue, Mrs. Luther visited Minnesota in early May and stayed through early November. During this period, she occupied her Minnetonka house. She closed the house in November and did not use it again until the spring of 1991. (App. A-2.)

During 1990, Mrs. Luther made two business trips from Florida to Minnesota in connection with her service as the Chairperson of the Board of Cardinal Glass Company. One of these trips was in March and the other was in December. In each instance, she arrived on the Friday before meetings held on Saturday and Sunday. She did not stay at her Minnetonka house. Instead, she stayed at the Minneapolis Marriott Hotel. She intended to return to Minnesota on the Monday following each of these meetings, but missed or otherwise changed her flights and so returned on Tuesday. (App. A-3.)

Mrs. Luther spent 171 full days in Minnesota and 176 full days outside of Minnesota during 1990. Mrs. Luther traveled between Minnesota and other states on each of the remaining 18 days of 1990. (App. A-4.)

During 1990, Mrs. Luther reported adjusted gross income of $3,271,761 on her federal income tax return. The parties agreed that the correct amount of her income from sources within Minnesota was $340,767. (App. A-4.) Most of her income from sources outside of Minnesota consisted of interest earned from intangible assets held on her behalf by a trust administered in Florida by Barnett Bank Trust Company ("Barnett"). (App. A-2.) The parties stipulated that Mrs. Luther received interest income of $2,597,086 from that trust.

Minnesota taxes individual "residents" on *all* of their income, regardless of whether it is derived from within or

without Minnesota. Minnesota law defines the term "resident" to include, in general, individuals who are domiciled in Minnesota.[1] The statute goes on to include as a "resident" any person domiciled outside the State who maintains an abode in Minnesota and "who spends in the aggregate more than one-half of the tax year in Minnesota . . ." For purposes of the "more than one-half of the tax year" test, the statute provides that a person's presence within the State for any part of a calendar day constitutes a day spent in Minnesota. Minn. Stat. § 290.01, subd. 7 (1990).

The Minnesota Tax Court, whose decision was affirmed by the Minnesota Supreme Court, held that "more than one-half of the tax year" meant more than 183 days. (App. A-26.) The Minnesota Supreme Court held that Mrs. Luther's 18 travel days are counted only as Minnesota days under the statute. Adding these 18 days to Mrs. Luther's 171 full days, the Court determined that Mrs. Luther spent 189 days within Minnesota. The Court declined Mrs. Luther's request that it apply the "more than one-half of the tax year" test by either (i) apportioning travel days between Minnesota and other states, or (ii) adding travel days to both the numerator (Minnesota days) and the denominator (total days). (App. A-8, A-10.) The Court also rejected Mrs. Luther's argument that her two business trips to Minnesota, during which she stayed at a hotel rather than her abode, should not be treated as Minnesota days. The Court attributed ten Minnesota days (out of 189 Minnesota days) to those business trips. The Court concluded that Mrs. Luther was a "resident" under Minnesota law, even though she was not a domiciliary, and

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[1] A Minnesota regulation states that the "domicile of any person shall be that place in which that person's habitation is fixed, without any present intentions of removal therefrom, and to which, whenever absent, that person intends to return.' Minn. R. 8001.0300, subpart 1 (1990).

upheld the imposition of an unapportioned tax on *all* of her income.[2]

In the pleadings filed in the Minnesota Tax Court, and in the briefs filed with the Tax Court and Minnesota Supreme Court, Mrs. Luther contended that the imposition of an income tax on the entirety of her income, as a result of her treatment as a "resident" under Minnesota law, was unconstitutional under the Due Process Clause and the Commerce Clause of the United States Constitution.

REASONS FOR GRANTING THE WRIT

This case presents a question of first impression with respect to whether the Due Process Clause or Commerce Clause prohibits a state from imposing a personal income tax upon the entirety of the income of an individual who is not domiciled in the state.

The term "domicile" has a well understood meaning at common law. As stated by this Court in Texas v. Florida, 306 U.S. 398, 424 (1939), "[r]esidence in fact, coupled with the purpose to make the place of residence one's home, are the essential elements of domicile." Further, "when one has once acquired a domicile in one place he does not lose it by mere residence elsewhere without the intention to make the new place of residence a domicile in the sense of a permanent home." Id. at 413.

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[2] Had Mrs. Luther been classified as a "nonresident" under Minnesota law, Minnesota's allocation and apportionment rules would have applied. Minn. Stat. § 290.17, subd. 1 (1990). Under those rules, income from intangibles not employed in a trade or business are sourced to a "nonresident's" state of domicile. Minn. Stat. § 290.17, subd. 2(c) (1990). The interest income Mrs. Luther earned from the intangible assets held by Barnett in trust for her benefit would have been sourced to her state of domicile (Florida) under this statute had Mrs. Luther been classified as a nonresident.

The decisions of this Court establish that a state may constitutionally impose an income tax on *all* of the income of a person domiciled in the state. New York ex rel. Cohn v. Graves, 300 U.S. 308 (1937); Lawrence v. State Tax Commissioner of Mississippi, 286 U.S. 276 (1932); Maguire v. Trefy, 253 U.S. 12 (1920).[3] However, this Court has never addressed whether a state may tax *all* the income of a person not domiciled in the state.

The Court's precedents permit a state to tax *some* of the income of a nondomiciliary. In Shaffer v. Carter, 252 U.S. 37 (1920), the Court held that Oklahoma could tax an individual on the income he derived from operating oil and gas properties within Oklahoma, notwithstanding that the business was managed from the taxpayer's state of domicile, Illinois. The due process requirements were satisfied by reason of the fact that the oil and gas properties received the protection of the laws of Oklahoma.

The Court's prior decisions do not control the instant case, however. The parties stipulated that Mrs. Luther was domiciled in Florida during the tax year at issue. Thus, this case is not controlled by Cohn, Lawrence or Maguire. Nor is it controlled by Shaffer, in which the Court permitted a nondomiciliary state to tax income derived from properties located within its borders. In the instant case, Mrs. Luther derived most of the income taxed by Minnesota from intangible investments that were managed by a trustee located in Florida, her state of domicile. Minnesota law did not provide any protection to the property rights inherent in those

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[3] It should be noted that in each of these cases it is clear from the facts that the taxpayer was a domiciliary of the taxing state, although the Court occasionally used the terms "domicile" and "residence" interchangeably. Cf. New York ex rel. Cohn, 300 U.S. at 313 ("A state may tax its residents upon net income from a business whose physical assets, located wholly without the state, are beyond its taxing power.") with id. at 313 ("Domicil itself affords a basis for such taxation.")

intangibles or to the activities of managing the intangible investments.

The Minnesota Supreme Court held that Minnesota could subject Mrs. Luther to a tax on *all* of her income, notwithstanding her Florida domicile and her receipt of substantial intangible income from investments managed by a Florida trustee, because she spent 171 full days and parts of 18 travel days within the State, even though she spent 176 full days and parts of 18 travel days outside the State. Under Minnesota law, Mrs. Luther was considered a "resident" even though not a domiciliary. At least 23 states have adopted statutory residence rules similar to Minnesota's under which an individual may be subject to tax on his or her total income even though not domiciled in the state.[4] The Petitioner respectfully urges the Court to take this case in order to

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[4] The following statutes treat a nondomiciliary as a "resident" subject to taxation with respect to income from sources outside the taxing state if the nondomiciliary maintains an abode in the state and spends more than one-half the days in the year (*e.g.*, more than six months or 183 days) within the state: Ark. Code Ann. § 26-51-102(9) (Michie 1997); Colo. Rev. Stat. § 39-22-103(8) (1998); Conn. Gen. Stat. § 12-701(a)(1)(B) (1997); Del. Code Ann. tit. 30, § 1103 (1998); D.C. Code Ann. § 47-1801.4 (1998); Ind. Code Ann. § 6-3-1-12 (Michie 1998); Ky. Rev. Stat. Ann. § 141.010(17) (1998); Me. Rev. Stat. Ann. tit. 36, § 5102.5 (West 1998); Md. Code Ann., Tax-Gen. § 10-101(h)(1) (1998); Mass. Gen. Laws ch. 62, § 1(f) (1999); Mo. Rev. Stat. § 143.101.1 (1999); Neb. Rev. Stat. § 77-2714.01(7) (1999); N.J. Rev. Stat. § 54(A): 1-2 (1999); N.Y. Tax Law § 605(b)(1)(B) (Consol. 1998); 72 Pa. Const. Stat. § 7301 (1998); R.I. Gen. Laws § 44-30-5 (1998); Utah Code Ann. § 59-10-103 (1998); Vt. Stat. Ann. tit. 32, § 5811 (1999); W. Va. Code § 11-21-7(a) (1999). The following statutes are similar, but require a longer physical presence within the state: Idaho Code § 63-3013 (1998) (abode and presence of more than 270 days in the state); N.D. Cent. Code § 57-38-01 (1999) (abode and presence of more than seven months in the state); Or. Rev. Stat. § 316.027 (1997) (abode and presence of more than 200 days in the state for other than a temporary or transitory purpose). Louisiana treats a nondomiciliary as a "resident" if he or she maintains a permanent place of abode *or* spends in the aggregate more than six-months of the year within the state. La. Rev. Stat. § 47:31 (West 1998).

clarify whether a State may constitutionally tax a nondomiciliary on all of his or her income by classifying such person as a "resident" and, if so, whether Minnesota's statutory residence rule as applied to the facts of this case satisfies the requirements of the Due Process and Commerce Clauses.

I. The Decision of the Minnesota Supreme Court Is Contrary to the Due Process Clause.

The Due Process Clause permits a state to tax all of the income from whatever source derived if the taxpayer is domiciled in the state. The right to tax

> . . . is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. *These are rights and privileges which attach to domicil within the state.* To them and to the equitable distribution of the tax burden, the economic advantage realized by the receipt of income and represented by the power to control it, bears a direct relationship.

New York ex rel. Cohn, 300 U.S. at 313 (emphasis added). Thus, a domiciliary may be subjected to tax on income derived from activities conducted outside the state of domicile.

By contrast, with respect to nondomiciliaries, the Due Process Clause requires that there be "'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" Allied Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768, 777 (1992). This "nexus requirement embodies two discrete inquiries: first, is there a minimum connection with (and hence jurisdiction over) the taxpayer; second, is there a minimum connection

with (and hence jurisdiction over) the activity the state seeks to tax." Hellerstein & Hellerstein, State Taxation ¶ 6.01 (1998).

Mrs. Luther did not contest Minnesota's jurisdiction over her person; in fact, she filed a Minnesota income tax return and paid tax on income derived from Minnesota sources. However, Mrs. Luther contends that her ownership of a Minnesota abode coupled with her presence within Minnesota for a portion of the year was an insufficient basis upon which Minnesota could tax *all* of her income. As this Court stated in Allied Signal, "there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax." 504 U.S. at 778.

The principle that there must be a connection to the activity itself, rather than just the person subject to tax, rests on the proposition "that the State's power to tax an individual's or corporation's activities is justified by the 'protection, opportunities and benefits' the State confers on those activities." Id. at 778 (quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940)). If a nondomiciliary conducts an activity wholly outside a state, then the state has not conferred any protection, opportunities or benefits upon the taxpayer's activities that would justify taxation of the activity. In Allied Signal, for example, the Court held that New Jersey could not tax the gains derived by a nondomiciliary corporate taxpayer from its sale of the stock of another corporation where the two corporations were not engaged in a unitary business and where the taxpayer's holding of the stock served an investment, rather than an operational, function. For Due Process (and Commerce) Clause purposes, New Jersey had an insufficient connection with the investment activity of the nondomiciliary corporate taxpayer.

Allied Signal is one of the more recent in a long line of this Court's decisions addressing the jurisdiction of a state to tax the intangible income of a corporation. The Court has

held that a corporation's legal or commercial domicile has the authority to tax a corporation's intangible income. Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936). It has also held that a state in which intangibles have acquired a business situs are entitled to tax the income therefrom. First Bank Stock Corp. v. Minnesota, 301 U.S. 234 (1937). If intangibles are employed in a trade or business (i.e., if they serve an operational rather than an investment function) the income therefrom may be apportioned. Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425 (1980). See generally Hellerstein & Hellerstein, State Taxation ¶ 9.03 (1998). However, a state may not tax any part of the income derived from intangibles if it is not the state of domicile or incorporation, if the intangibles have no business situs in the state, and if the intangibles serve an investment function rather than an operational (i.e., business) purpose. Allied Signal, supra.

Several of these corporate income tax cases have individual income tax counterparts. Cases allowing the state of commercial domicile to tax all of a corporation's income are analogous to New York ex rel. Cohn, Lawrence, and Maguire, which upheld a state's entitlement to impose a personal income tax upon the entirety of a domiciliary's income. Cases allowing the taxation of income from intangibles that have acquired a business situs in a state are analogous to Shaffer, which allowed Oklahoma to tax income from oil and gas properties within the state.

This case is most analogous to Allied Signal. Mrs. Luther earned interest income of $2,597,086 from a trust, the trustee of which was Barnett. Barnett managed the intangible assets that produced the interest income in Florida. The State conceded below that the income was passive investment income that was not derived from a trade or business conducted within Minnesota. As in Allied Signal, the taxpayer here is not domiciled in the taxing state, and the income was derived from investment activities occurring

outside the taxing state. Minnesota had no "minimum connection" to Mrs. Luther's investment activity and had no right to tax the income from it.

The Minnesota Supreme Court purported to distinguish Allied Signal on the grounds that "individual taxpayers and corporate taxpayers may constitutionally be treated differently for tax purposes." (App. A-14.) As an equal protection matter, individuals and corporations may be accorded differential tax treatment if there is a rational basis for the difference. See Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973). However, this Court's decisions under the Due Process Clause do not support the conclusion that there is a lower jurisdictional threshold applicable to individuals than to corporations. Indeed, as noted above, the Court's personal income tax and corporate income tax decisions in this area are analogous.

Mrs. Luther argued below that only Florida, as the state of domicile and the state where the investments were managed, could tax her intangible income. The Minnesota Supreme Court, rejecting this claim, cited Curry v. McCanless, 307 U.S. 357 (1939), for the proposition that more than one state may tax a taxpayer's intangibles. (App. A-14.) The Court also cited Curry as upholding the doctrine of *mobilia sequuntur personam* ("movables follow the [law of the] person"), which the Court understood to mean that "ownership of intangible assets and income derived from that ownership follow the beneficial owner wherever she goes and may, in proper situations, be taxed in multiple jurisdictions." (App. A-18.)

The doctrine of *mobilia sequuntur personam* stands for a principle precisely the opposite of that stated by the Minnesota Supreme Court. As explained in Curry, the phrase expresses "the identity or association of intangibles with the person of their owner *at his domicile* which gives jurisdiction to tax." Id. at 367 (emphasis added); see also Maguire, 253 U.S. at 16 (the "general rule" expressed in the maxim *mobilia*

sequuntur personam is that taxation is justified "at the domicile of the owner"); Delaware v. New York, 507 U.S. 490, 503 (1993) (the common law rule of *mobilia sequuntur personam* means that intangible personal property is found at the domicile of its owner). Contrary to the Minnesota Supreme Court's opinion, the right of a state to tax intangible income does not "follow the beneficial owner wherever she goes." That right is inherent in the state of domicile.

Curry held that Tennessee and Alabama could both impose death taxes upon the transfer of certain intangibles. The jurisdiction of Tennessee was premised upon its having been the domicile of the decedent, under the principle of *mobilia sequuntur personam*. The jurisdiction of Alabama was premised upon the decedent's having vested "legal title to the intangibles and limited powers of control over them in an Alabama trustee." Curry, 307 U.S. at 369 While Curry holds that there is no absolute due process bar to taxation of intangibles by more than one state, contrary to the Minnesota Supreme Court's decision it does not authorize taxation by a state other than (i) the state of domicile and (ii) the state where the intangibles are held and managed by a trustee. In this case, Mrs. Luther was domiciled in Florida and her trust assets were managed by a Florida trustee. Curry does not provide a theory upon which Minnesota would have jurisdiction to tax.[5]

Minnesota's theory, by contrast, is that a state can tax the entirety of an individual's income *as if he or she were a*

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[5] The Minnesota Supreme Court also cited State Tax Commission of Utah v. Aldrich, 316 U.S. 174 (1942), in which it was held that Utah could impose a tax on the transfer at death of shares in a Utah corporation, notwithstanding that the decedent was domiciled in New York. The requirements of the Due Process Clause were satisfied because "Utah law defines the nature and extent of the interest of the shareholders in the corporation." Id. at 180. By contrast, Minnesota does not base its claim to jurisdiction on any claim that the intangibles held by Barnett in trust for the benefit of Mrs. Luther derive their existence from Minnesota law.

domiciliary if the individual maintains an abode in Minnesota and spends more than one-half of the year in Minnesota. The Minnesota statute does more than create a presumption of domicile; it creates a new classification of "resident" separate and distinct from domicile. The Minnesota Supreme Court concluded that Mrs. Luther was a "resident" even though it acknowledged that she was a Florida domiciliary. (App. A-2, A-10).

While there are no personal income tax decisions on point, this Court's corporate income tax cases lead to the conclusion that Minnesota's "abode coupled with presence for more than one-half the year" rule does not satisfy the Due Process Clause. In Allied Signal, for example, a taxpayer commercially domiciled in Michigan owned several corporate facilities within New Jersey through which it engaged in the development and manufacture of aerospace products. Despite the taxpayer's ownership of real estate and corporate presence within New Jersey for the *entirety* of the year, this Court held that although New Jersey had jurisdiction over the corporation for purposes of taxing its business income, it did not have jurisdiction to tax the corporation's investment activities. 504 U.S. 768 (1992).

Moreover, even if a state can impose an "abode coupled with presence for more than one-half the year" rule consistent with the Due Process Clause, the application of such a rule in the instant case violates the Due Process Clause because Mrs. Luther spent more days outside Minnesota than she did within it. Mrs. Luther spent 171 full days within Minnesota, 176 full days outside Minnesota, and 18 days travelling between Minnesota and other states. It was only by counting those 18 travel days as if they were full Minnesota days that the Minnesota Supreme Court was able to conclude that Mrs. Luther spent more than one-half the year within Minnesota. The law, as applied to the facts of this case, is unconstitutional.

Finally, not only does Minnesota's tax violate the Due Process Clause requirement that a state have a minimum connection with the activity it seeks to tax, it also violates the additional requirement that there be a rational relationship between the income attributed to a state and the taxpayer's activities in the state. Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425, 436-437 (1980). Even if it were permissible for Minnesota to impose its tax on the investment income of a nondomiciliary, it would not be permissible to impose the tax on the unapportioned totality of that income. Although this Court has not had occasion to address this issue in the personal income taxation context, the Court has consistently required fair apportionment where states have imposed taxes on the income of corporate nondomiciliaries. See, e.g., Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983) and Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978).[6] The Court should grant certiorari to hold that this well established rule applies to the personal income taxation of nondomiciliaries.

II. The Minnesota Supreme Court Erred When It Held That the Commerce Clause Was "Not Implicated Through Application of [Minnesota's] Nondomiciliary Resident Statute."

Mrs. Luther challenged Minnesota's taxation of nondomiciliary residents under the Commerce Clause. The

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[6] The Court's fair apportionment jurisprudence has required that a state's tax laws satisfy two tests: a tax must be both internally consistent and externally consistent. Internal consistency means that the taxing scheme, "if applied by every jurisdiction, it would result in no more than all of the [taxpayer's] income being taxed." Container, 463 U.S. at 169. External consistency means that an "apportionment formula must actually reflect a reasonable sense of how income is generated." Id. at 169. Mrs. Luther argued below that neither of these requirements was satisfied by Minnesota's unapportioned tax.

Minnesota Supreme Court held that because "the Commerce Clause is not implicated through application of the nondomiciliary resident statute, we need not decide whether the nondomiciliary resident statute is constitutional under the Commerce Clause." (App. A-18.)

Whether a state tax significantly affects interstate commerce so as to implicate the Commerce Clause is a substantial federal question that this Court recently addressed in Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997). The Court there held that a Maine property tax statute violated the Commerce Clause by denying a property tax exemption to a nonprofit summer camp because the camp did not operate principally for the benefit of Maine residents. In response to the argument of the taxing authority that the Commerce Clause was not implicated by the tax, the Court noted that the "attendance of these campers necessarily generates the transportation of persons across state lines that has long been recognized as a form of 'commerce.'" Id. at 573.

Mrs. Luther asserted below that the Commerce Clause was implicated because her travels to and from Minnesota – an activity "long recognized as a form of 'commerce'" – gave rise to Minnesota's claim that she was a "resident" under Minn. Stat. § 290.01, subd. 7 (1990). Indeed, Mrs. Luther spent just 171 full days within Minnesota, compared with 176 full days outside Minnesota. Only by counting the 18 days that Mrs. Luther spent travelling between Minnesota and other states as *full* Minnesota days were the courts below able to hold that Mrs. Luther had spent "more than one-half the tax year" (i.e., more than 183 days) within Minnesota.

Furthermore, of the 189 days counted as Minnesota days, ten were spent by Mrs. Luther on business trips to attend board meetings of Cardinal Glass Company. Four of these ten days were travel days between Florida and Minnesota. On the remaining six days, Mrs. Luther stayed at the Minneapolis Marriott Hotel (*not* at her house in Minnetonka).

This Court has held that the patronage of a hotel implicates the Commerce Clause. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). Had the ten days spent on business trips not been counted as Minnesota days by the courts below, Mrs. Luther would not have been classified as a "resident" under state law.

The Minnesota Supreme Court reasoned that the Commerce Clause was not implicated because "[t]he requirement that she pay Minnesota income tax was triggered by conduct that took place wholly within Minnesota and that did not substantially affect interstate commerce." (App. A-17.) As a factual matter, the Court's statement is not correct. The core of Mrs. Luther's statutory construction argument below was that her 18 travel days – which involved conduct that did *not* take place *wholly* within Minnesota – should not be counted as full Minnesota days, and if this argument had succeeded Mrs. Luther would not have been classified as a "resident."

Even if the Court's statement were correct on the facts, however, it would be wrong as a matter of law. This Court has "long . . . rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity." Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981). A tax levied on a local activity "may substantially affect interstate commerce, and this effect is the proper focus of Commerce Clause inquiry." Id. at 616. See also Camps Newfound/Owatonna, 520 U.S. at 573 (quoting Heart of Atlanta Motel, 379 U.S. at 258 ("Even when business activities are purely local, if 'it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze'")); but see Tamagni v. Tax Appeals Tribunal, 695 N.E. 2d 1125 (NY), cert. den., __ U.S. __, 119 S.Ct. 340 (1998).

By taxing a nondomiciliary on his or her *total* income based on days spent within Minnesota, and by counting travel

days as *full* Minnesota days, the Minnesota statute has a real and direct effect upon interstate commerce. The statute deters a nondomiciliary who owns an abode in Minnesota (even a vacation home) from travelling to Minnesota for business or pleasure. For example, had Mrs. Luther been aware of the State's construction of the statute, she would have been well advised not to attend the board meetings of Cardinal Glass Company in Minneapolis. The law thus impedes Mrs. Luther (and those like her) from pursuing business opportunities requiring a presence in Minnesota. It also adversely impacts businesses, such as Cardinal Glass Company, that may want to engage the services of nondomiciliaries. And, obviously, Minnesota's residency statute has a negative impact on businesses in the interstate travel industry (e.g., airlines and hotels) since it discourages nondomiciliaries from travelling to Minnesota.

Furthermore, the Minnesota Supreme Court held that Mrs. Luther's income from intangible assets could be subjected to taxation in multiple states, because such assets are deemed to "follow the beneficial owner wherever she goes." (App. A-18.) The Court upheld the imposition of an *unapportioned* tax on Mrs. Luther's intangible income because Mrs. Luther had availed herself of "the services, benefits, and protections Minnesota provided to her." (App. A-18.) Under this rationale, to the extent that Mrs. Luther spent any amount of time in other states, each of those other states could also impose an *unapportioned* tax on Mrs. Luther's intangible income, since her intangibles follow her "wherever she goes."

While the Court hedged its holding by allowing that multiple taxation would only be appropriate "in proper situations" (App. A-18), it failed to identify what those "proper situations" might be. The Court upheld "residency" as a basis for taxation where "residency" was defined to require an abode plus presence within Minnesota for "more than one-half the tax year" (counting travel days as full days).

However, would it be "proper" for a state to treat a nondomiciliary present within the state for only one-quarter the tax year as a resident? Would presence for just one day be enough? Obviously, if a state is permitted to tax the intangible income of a nondomiciliary at all, the Commerce Clause is implicated as a source of limitations on the power to tax. Commerce in intangible securities is impacted by state taxation, and that impact could be severe if each state through which a person traveled were allowed to impose an unapportioned tax on the person's intangible income.[7] Clearly, the Minnesota Supreme Court's holding that the Commerce Clause is not implicated by Minnesota's "residency" rule is in error.

This Court has applied a four-part analysis for testing the constitutionality of a state tax under the Commerce Clause. A tax does not run afoul of the Commerce Clause if it: (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). Mrs. Luther argued below that the imposition by Minnesota of a tax on all of her income violated each of these requirements.

Mrs. Luther's arguments under the first and second prongs – substantial nexus and fair apportionment – were similar to the arguments she made under the Due Process

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[7] Furthermore, if the Minnesota Supreme Court were correct and if the Commerce Clause were not implicated by a state's application of a nondomiciliary resident statute (App. A-18), not even Congress could step in to limit state taxation of nondomiciliaries since "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." Hughes v. Oklahoma, 441 U.S. 322, 326 n.2 (1979). Thus, Congress would be powerless to limit state taxation in this area under the Court's holding, even if a state were to tax the entirety of an individual's intangible income based on a one-day presence in the state.

Clause, as discussed above. Given the large number of states that impose a tax on a basis other than domicile and the variety of approaches toward defining "residency" as a basis for taxation,[8] this Court should grant this petition for certiorari in order to clarify the following: whether the states may impose a personal income tax on a basis other than domicile; if so, what standards the states are subject to in imposing such a tax; and whether it is permissible to tax the income of a nondomiciliary on an unapportioned basis.

With respect to the third and fourth prongs of the Complete Auto test, Mrs. Luther argued that Minnesota law discriminates against interstate commerce and is unfair as applied to her because, in assessing whether a nondomiciliary spends more than one-half the tax year within Minnesota, the law considers a day spent travelling between Minnesota and another state as a Minnesota day. This is so regardless of how many hours in the travel day are actually spent in Minnesota. Mrs. Luther spent more full days outside of Minnesota than within it, yet was subjected to a tax on all of her income. The law subjects her to the risk of multiple taxation, whereas a non-travelling Minnesota domiciliary is not subject to this risk.

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[8] See note 4, supra.

CONCLUSION

For the reasons set forth above, we respectfully request that this Court grant certiorari to reverse the decision of the Minnesota Supreme Court.

Dated: June 11, 1999

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STATE OF MINNESOTA

IN SUPREME COURT

CO-98-406

Tax Court

Anderson, Paul H., J.
Took no part: Gilbert, J.

Adelyn L. Luther,

Relator

vs.

Filed: February 4, 1999
Office of Appellate Courts

Commissioner of Revenue,

Respondent.

OPINION

ANDERSON, PAUL H., Justice

Relator Adelyn L. Luther appeals, by writ of certiorari, from the Minnesota Tax Court's decision affirming the Commissioner of Revenue's determination that Luther was a nondomiciliary resident for Minnesota income tax purposes and that, therefore, Minnesota could properly tax her worldwide income. The commissioner determined that, in 1990, Luther fit within Minnesota's definition of a nondomiciliary resident because she (1) maintained an abode in Minnesota and (2) spent more than one-half of 1990 here. Based on this determination, the commissioner adjusted Luther's assessed income tax, increasing the tax due from $23,309 to $238,101.36 plus interest.

Luther appealed the commissioner's determination to the tax court, asserting that she did not fit within the statutory definition of a nondomiciliary resident because she was not present in Minnesota for more than one-half of 1990. In the alternative, Luther argued that if she did fit within the definition of a nondomiciliary resident, then the nondomiciliary resident statute violates both the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Commerce Clause of the United States Constitution. The tax court agreed with the commissioner's determination that Luther fit within the definition of a nondomiciliary resident and also concluded that the nondomiciliary resident statute violates neither the Due Process Clause of the Fourteenth Amendment nor the Commerce Clause. We affirm.

The essential facts underlying this case are undisputed. It appears that, prior to 1987, Luther was a Minnesota domiciliary, but that, since 1987, Luther has been a Florida domiciliary. In 1990, Luther owned a single-family dwelling in Minnetonka, Minnesota, as well as dwellings in Florida, Hawaii, and Montana. In Florida, Luther owned and maintained her primary dwelling, which was homesteaded. In 1989 and 1990, Luther lived in her Florida dwelling from November until the following May. She was registered to vote in Florida, maintained a driver's license and registered a motor vehicle there, and held membership in a Florida social club. She maintained Florida checking and savings accounts. The investment activities for the Morris L. Gordon Family Trust - the income from which is the primary subject of this litigation - were performed principally in Florida.

In 1990 in Minnesota, Luther maintained what she considered to be her summer home, which was not homesteaded. She lived in this dwelling from approximately early May until early November, at which time it was "closed up" for the winter and Luther relocated to her Florida dwelling. Luther also had at least three bank accounts in

Minnesota in 1990, including a checking and a savings account with Norwest Bank and a savings account with Marquette Bank. In addition, she maintained an investment account in Minnesota with Merrill Lynch, which managed approximately $205,000 of her investments.

Luther maintained numerous business contacts in Minnesota in 1990. She was a stockholder in and served as chairperson of the board of directors of Cardinal Glass Company, a Minnesota subchapter S corporation that was started over 30 years ago by her late husband. In her capacity as chairperson of the board, she attended director and shareholder meetings of Cardinal Glass that commenced on the following dates and were held at the following locations: March 31 - Minneapolis; July 10 - Minneapolis; December 6 - Kansas City; and December 7 - Minneapolis. During the July board meeting, Luther was living in her Minnetonka dwelling. During the March and December board meetings, Luther traveled to Minnesota from Florida and stayed in a hotel because her Minnetonka home had been closed up for the winter. When Luther traveled to Minnesota from Florida to attend both the March and December board meetings, she arrived on Friday, attended the board meeting on Saturday, attended a board of directors luncheon on Sunday, missed or otherwise changed her flight on Monday, and returned to Florida on Tuesday. Cardinal paid all Luther's expenses associated with attending these meetings, including air fare and hotel.

During 1990, Luther also owned 85.73% of the voting stock and served as president of Richatti Investment Company, a Minnesota corporation started in 1967, originally under the name of Almore Company. Richatti, named after Luther's children, is a holding company that owns real estate in Minnesota. In addition to her involvement with Cardinal Glass and Richatti, Luther owned rental property in Minnesota in 1990.

During 1990, Luther spent 171 full days in Minnesota and spent 176 full days outside of Minnesota. The remaining 18 days of that year were days when Luther spent part of the day in Minnesota, but traveled between Minnesota and another location. How these 18 days are treated is critical to Luther's claim that she is not a Minnesota nondomiciliary resident. These 18 days will be referred to in this opinion as "travel days."

Luther's 1990 federal individual income tax return indicates that her 1990 adjusted gross income was $3,271,761 and that her 1990 federal income tax payable was $858,301. For 1990, she realized gross interest income of $2,863,029, of which $181,299 was reported on her federal income tax return as being tax-exempt interest. Of the tax-exempt interest, $178,839 was derived from non-Minnesota obligations. Luther reported the net amount of $2,681,730 as 1990 taxable interest income.

Luther filed a 1990 Minnesota nonresident income tax return, on which she reported income from sources within Minnesota in the amount of $308,636 and income tax payable to Minnesota of $23,309. However, the parties agree that the correct amount of income from sources within Minnesota in 1990 should have been $340,767. Luther filed a Florida individual intangible tax return for taxable assets as of January 1, 1990 in which she listed total taxable assets of $2,829,133 and tax due of $2,829.

The commissioner examined Luther's 1990 income tax returns and supporting documentation. At the conclusion of this examination, Luther and the commissioner could not agree on whether Luther fit within the definition of a nondomiciliary resident in 1990[1]. The nondomiciliary resident statute provides that a person will be considered a

[1] Minnesota Statute section 290.01, subdivision 7 (2) has been amended since 1990. However, the definition of a nondomiciliary resident has not changed or been amended.

Minnesota resident when that person: (1) maintains an abode in Minnesota, and (2) spends in the aggregate more than one-half of the tax year here. *See* Minn. Stat. section 290.01, subd. 7 (2) (1990). The commissioner determined that Luther was a nondomiciliary resident of Minnesota in 1990 because: (1) she maintained an abode - a single-family dwelling-in Minnesota, and (2) she spent 189 complete or partial days in Minnesota. Based on this determination, the commissioner recalculated Luther's Minnesota income tax assessment, then issued a Notice of Change in Income Tax assessing the amount owed by Luther to be $322,374.58-$238,101.36 in tax plus $84,273.22 in interest.

Luther appealed the commissioner's determination to the tax court. On appeal, Luther contended that she had not spent more than one-half of the year in Minnesota in 1990 and that, consequently, she did not fit within the definition of a nondomiciliary resident and Minnesota could not tax her worldwide income. She also raised the following constitutional issues: whether the Minnesota nondomiciliary resident statute violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, the Commerce Clause of the U.S. Constitution, and the Due Process Clause of the Minnesota Constitution. The tax court referred determination of these constitutional issues to the district court. The district court subsequently transferred determination of these issues back to the tax court.

At trial, Luther argued that the Minnesota nondomiciliary resident statute requires the commissioner to compare the number of days Luther spent in Minnesota with the number of days she spent outside Minnesota in order to determine whether she spent more than one-half of 1990 in Minnesota. She argued that the 18 travel days the commissioner allocated as days spent in Minnesota should have either been allocated as both days spent in Minnesota and days spent outside of Minnesota or apportioned between Minnesota and Luther's non-Minnesota location. She also argued that some of the

days she spent in Minnesota in 1990 should not have been counted as days spent in Minnesota because those days fell under Minnesota's transit rule - a rule providing that "a person in transit between two points outside Minnesota who is physically present in Minnesota less than 24 hours, will not be treated as present in Minnesota on any day during transit." Minn. R. 8001.0300, subp. 4 (1989). Luther claimed, alternatively, that application of the nondomiciliary resident statute violated the Due Process Clause of the Fourteenth Amendment because her intangible income was not within Minnesota's tax jurisdiction and, thus, application of the statute represented an unconstitutional extraterritorial tax. Finally, she argued that application of the statute violated the Commerce Clause in that such application constituted a discriminatory tax on interstate travel and was not fairly apportioned or related to the benefits Luther received in Minnesota.

The tax court affirmed the commissioner's order assessing additional personal income tax liability against Luther. The court concluded that Luther was a Minnesota resident as defined in the nondomiciliary resident statute, that the language of the statute means that when a person spends more than one-half of the days of a year in Minnesota, then that person fits within the meaning of the statute, and that the transit exception was inapplicable to Luther's case. The court also concluded that Luther's contacts with Minnesota in 1990 sufficiently demonstrated that she "availed herself of the protection of the laws of the state" and that, therefore, application of the nondomiciliary resident statute did not violate the Due Process Clause of the Fourteenth Amendment. Finally, the tax court concluded that, while the Commerce Clause was implicated in Luther's case in that "movement between states constitutes interstate travel," application of the nondomiciliary resident statute does not violate the Commerce Clause.

Luther appeals to this court on writ of certiorari, again arguing that she does not fit within Minnesota's definition of a nondomiciliary resident and that, alternatively, if she does fit within the definition, then Minnesota's nondomiciliary resident statute is unconstitutional under the Due Process Clause of the Fourteenth Amendment and the Commerce Clause.

I.

Luther first asserts that she does not fit within the statutory definition of a Minnesota nondomiciliary resident because she was not present in Minnesota in 1990 for "more than one-half of the year." Minn. Stat. section 290.01, subd. 7 (2). Construction of statutory provisions are matters of law which we review de novo. *See In re Conservatorship of Foster*, 547 N.W.2d 81, 84-85 (Minn. 1996). When the language of a statute is clear, courts must apply that plain language. Minn. Stat. section 645.16 (1998).

Minnesota individual income tax statutes provide two definitions of a Minnesota resident. Minn. Stat. section 290.01, subd. 7 (1990). First, a person may be considered a Minnesota resident if that person is domiciled in Minnesota. Minn. Stat. section 290.01, subd. 7 (1) (1990). Second, a nondomiciliary may be considered a Minnesota resident if that person (1) maintains a place of abode in Minnesota and (2) spends in the aggregate more than one-half of the tax year in Minnesota. Minn. Stat. section 290.01, subd. 7 (2). This second definition of a Minnesota resident - the nondomiciliary resident statute-is at issue in this case. If a taxpayer is a Minnesota "resident," Minnesota taxes her worldwide net income. *See* Minn. Stat. section 290.01, subd. 7, 290.014, subd. 1 (1990). The state taxes the income of nonresidents only to the extent that income is derived from activities within Minnesota. Minn. Stat. section 290.014, subd. 2 (1990).

Luther does not dispute that she fits within the first prong of the nondomiciliary resident statute-she maintains a place of abode in Minnesota in the form of the single-family dwelling she owns and occupies in Minnetonka. Rather, Luther asserts that she did not spend more than one-half of 1990 in Minnesota and that, therefore, she does not fit within the second prong of the statute. In asserting that she did not spend more than one-half of 1990 in Minnesota, Luther does not challenge the fact that she was present in Minnesota for 189 days that year. She acknowledges that she spent 171 full days in Minnesota in 1990. She also acknowledges that in 1990 she spent part of each of the 18 travel days in Minnesota. Instead, she takes issue with the commissioner's application of the nondomiciliary resident statute to the travel days and to days she spent in Minnesota while attending board of directors' meetings for Cardinal Glass in March and December.

Luther asserts that the nondomiciliary resident statute requires the commissioner to either allocate each of the 18 travel days as both a day spent in Minnesota and a day spent outside of Minnesota or apportion those 18 days between Minnesota and her other destination. She further asserts that after this allocation or apportionment is made, the commissioner must then compare the number of days she spent in Minnesota with the number of days she spent outside of Minnesota to determine whether she spent more than one-half of the year in Minnesota. Under Luther's first method of calculation, she spent 189 days in Minnesota and 194 days outside of Minnesota. Under her second method of calculation, she spent 180 days in Minnesota and 185 days outside of Minnesota. Luther concludes that because, under each of her methods of calculation, she spent more time outside of Minnesota than she spent in Minnesota in 1990, she did not spend more than one-half of the year in Minnesota and, therefore, she does not fit within the definition of a nondomiciliary resident.

Luther's methods of calculation are contrary to the plain language of the nondomiciliary resident statute. The nondomiciliary resident statute speaks only to ascertaining days spent in Minnesota. Specifically, the statute provides that "presence within the state for any part of a calendar day constitutes a day spent in the state." Minn. Stat. section 290.01, subd. 7 (2). The statute contains no corresponding provision that provides for ascertaining days spent outside of Minnesota or for the apportionment of days between Minnesota and the other location to or from which Luther traveled. Moreover, the plain language of the nondomiciliary resident statute does not suggest, much less require, any comparison of days spent in Minnesota and outside of Minnesota during a given tax year. As the nondomiciliary resident statute speaks only to ascertaining days spent in Minnesota, we conclude that neither of Luther's proposed methods of calculation comports with the plain language of the nondomiciliary resident statute. Thus, we decline to adopt either of Luther's proposed methods of allocating the travel days.

Luther next asserts that the two five-day periods of time she spent in Minnesota while attending board of directors' meetings in March and December of 1990 should be excluded from the commissioner's calculation of days spent in Minnesota. Each of these five-day periods of time began and ended with a travel day and included three full days in Minnesota between the travel days. In support of her position, Luther argues that we should read Minnesota's transit rule expansively. The transit rule is an exception to the general rule that presence within the state for any part of a calendar day constitutes a day spent within the state.

Rules properly promulgated by the commissioner "have the force of law." See Minn. Stat. section 270.06(13) (1990). Consequently, the transit rule, a rule properly promulgated by the commissioner and, accordingly, having the force of law, is subject to the same rules of construction as a statute. See

Minn. Stat. section 645.16. Therefore, if the plain language of the transit rule is clear, we must apply that plain language. *See Id.*

The transit rule provides that "a person in transit *between two points outside Minnesota who is physically present in Minnesota less than 24 hours*, will not be treated as present in Minnesota on any day during transit." Minn. Rules 8001.0300, subp. 4 (emphasis added). Luther argues that Florida was both her origination point and her destination point during her two five-day business trips to Minnesota and that, therefore, the transit rule should be read expansively to include as days spent outside of Minnesota all ten of the days she spent in Minnesota while on these business trips. The transit rule, however, plainly applies only to persons who are (1) traveling through Minnesota while in transit between two other, non-Minnesota locations, and (2) physically present in Minnesota less than 24 hours. *See id.* While Luther was in Minnesota for business purposes, she was not traveling through Minnesota on her way from one non-Minnesota location to another - Minnesota was her destination. Moreover, Luther was present in Minnesota for much longer than 24 hours on each of her business trips. The plain language of the transit rule, which is clear and which this court must apply, does not comport with the reading Luther urges. *See* Minn. R. 8001.0300, subp. 4; Minn. Stat. section 645.16. Accordingly, we conclude that Luther's assertion that the ten days she spent in Minnesota on her two business trips should not be counted as days present in Minnesota lacks merit.

In summary, we decline to adopt either of Luther's proposed methods for allocating the 18 travel days and we conclude that the ten "business" days Luther spent in Minnesota should be counted as days she was present in Minnesota. Therefore, we hold that Luther was present in Minnesota for more than one-half of 1990 and that she fits within Minnesota's definition of a nondomiciliary resident.

II.

Luther next argues that Minnesota's nondomiciliary resident statute is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Due process deals with the fairness of the tax at issue and ensures that the taxpayer has adequate notice that she may be subject to the tax. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 307 (1992). To satisfy due process, there must be (1) "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" and (2) a rational relationship between "the income attributed to the State for tax purposes [and the] values connected with the taxing State." *Id.* at 306 (citation and internal quotation omitted).

The federal system provides the states wide latitude in determining their taxation schemes. *See State Tax Comm'n v. Aldrich*, 316 U.S. 174, 178-79 (1942). We exercise our power to declare a statute unconstitutional with extreme caution and only when absolutely necessary. *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979). In challenging the nondomiciliary resident statute on constitutional grounds, Luther bears the heavy burden of showing that the statute is unconstitutional beyond a reasonable doubt. *See Caterpillar, Inc. v. Commissioner of Revenue*, 568 N.W.2d 695, 697-98 (Minn. 1997).

To satisfy the first requirement of the due process analysis, there must be a "minimum connection between the state and the person, property, or transaction it seeks to tax." *Quill*, 504 U.S. at 306. This minimum connection has been likened to the minimum contacts necessary to establish personal jurisdiction. *See id.* at 307 (referencing

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Thus, the relevant inquiry is whether Luther had minimum contacts with Minnesota such that imposition of the tax "does not offend traditional notions of fair play and substantial justice." *See id.* (citation and internal quotation omitted). To be subject to taxation under Minnesota's nondomiciliary resident statute, a taxpayer must spend a substantial amount of time, more than one-half of the days in a given tax year, in Minnesota. *See* Minn. Stat. section 290.01, subd. 7(2). Further, she must also maintain an abode in Minnesota. *See id.* Luther maintained an abode in Minnesota and, in the aggregate, spent a majority of the days of 1990 here. She has not presented a compelling argument that this connection between Minnesota and her person, as required by the nondomiciliary resident statute, is less than the minimum connection required to satisfy the Due Process Clause. Thus, we conclude that application of the nondomiciliary resident statute does not violate the first requirement of the due process analysis.

To satisfy the second requirement of the due process analysis, a tax must reflect a rational relationship between the income attributed to the state for tax purposes and the "values connected with the taxing state." *Moorman Mfg. Co. v. Blair*, 437 U.S. 267, 273 (1978) (*citing Norfolk & Western R. Co. v. State Tax Comm'n*, 390 U.S. 317, 325 (1968)).

> "The income tax is founded upon the protection afforded to the recipient of the income by the government, in his right to receive the income and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom and of being protected by law. It gives security to life, liberty and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based

upon the income, in the fruition of which it defends him from unjust interference."

Maguire v. Trefry, 253 U.S. 12, 14 (1919) (*quoting Maguire v. Comm'r*, 120 N.E. 162, 166 (1918)).

In 1990, Luther had the opportunity to enjoy the many services, benefits, and protections afforded her by Minnesota in her right to receive and enjoy her income. She used Minnesota roads and enjoyed police and fire protection. Her home was protected by these services all year long. On every day of the year, state laws protected her checking, savings, and investment accounts, as well as the corporations with which she was affiliated. When Luther was in the state, she also benefited from Minnesota's high health and environmental standards, educational opportunities, arts and cultural opportunities, and state recreational resources, all of which are supported by state government. While the above list of services, benefits, and protections is not exhaustive, this listing makes it clear that, for the majority of 1990, Luther enjoyed the many services, benefits, and protections Minnesota provided for her. Therefore, Minnesota required her to contribute to the costs associated with providing those services, benefits, and protections by taxing her income as a nondomiciliary resident. Luther cannot carry her burden of proving beyond a reasonable doubt that Minnesota's requirement that she contribute to the costs associated with providing the many services, benefits, and protections she received is not rationally related to her receipt and enjoyment of those services, benefits, and protections. Thus, we conclude that the nondomiciliary resident statute does not violate the second requirement of the due process analysis.

Luther attempts to analogize her case to business taxation cases which apply the unitary business rule of apportionment. Under the unitary business rule of apportionment, a state may tax the income of a multistate business only in proportion to the percentage of the larger, unitary business that is

represented by the in-state component of that business. *See Allied-Signal, Inc. v. Director, Div. of Tax'n*, 504 U.S. 768, 778 (1992). The concern underlying the unitary business rule of apportionment is the risk of multiple taxation. See id. However, individual taxpayers and corporate taxpayers may constitutionally be treated differently for tax purposes. *See Lawrence v. State Tax Comm'n*, 286 U.S. 276, 283 (1932). Indeed, states may impose "double taxation, or any other form of unequal taxation [on an individual taxpayer], so long as the inequality is not based upon arbitrary distinctions." *See Shaffer v. Carter*, 252 U.S. 37, 58 (1920). Moreover, even if the risk of multiple taxation of individual taxpayers was a due process concern, no such taxation would result here because Minnesota provides a credit for income tax paid to a nondomiciliary resident's state of domicile. *See* Minn. Stat. section 290.06, subd. 22 (a) (1990).

Luther also argues that Minnesota cannot tax her intangible income because only Florida, her state of domicile, may tax this intangible income. Two of the three cases Luther cites in support of her argument do not support her position. *See Curry v. McCanless*, 307 U.S. 357, 368 (1939) (stating "there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles"); *Hillstrom v. Commissioner of Revenue*, 270 N.W.2d 265 (Minn. 1978) (holding that a state of domicile may tax intangible income in the form of gambling winnings from out of state gambling, but not discussing whether a state other than the state of domicile may tax such intangible income). The third case Luther cites in support of her position has been implicitly overruled. *See Newport Co. v. Wisconsin Tax Comm'n*, 261 N.W. 884 (Wisc. 1935) (holding that only the state of domicile may tax income from intangibles), *implicitly overruled by State Tax Comm'n v. Aldrich*, 316 U.S. 174, 181-82 (1942) (stating "[a]nother state which has extended benefits or protection, or which can demonstrate `the practical

fact of its power' or sovereignty as respects the [intangibles], may likewise constitutionally make its exaction.") (internal citation omitted).

We conclude that Minnesota's nondomiciliary resident statute is based on a minimum connection between Minnesota and Luther and that imposition of the tax represents a rational relationship between Luther's income and the benefits she received from Minnesota. Accordingly, we hold that Minnesota's nondomiciliary resident statute is constitutional under the Due Process Clause of the U.S. Constitution.

III.

Finally, Luther argues that application of Minnesota's nondomiciliary resident statute violates the Commerce Clause of the U.S. Constitution. A tax may be consistent with due process but still violate the Commerce Clause. *Quill*, 504 U.S. at 313 n.7. While the Due Process Clause is concerned with fairness in the form of notice to a taxpayer that she may be subject to a state tax, the Commerce Clause focuses on "structural concerns about the effects of state regulation on the national economy." *Id.* at 312. As with her arguments under the Due Process Clause, Luther bears the burden of proving beyond a reasonable doubt that the nondomiciliary resident statute is unconstitutional under the Commerce Clause. *See Caterpillar*, 568 N.W.2d at 697-98.

The Commerce Clause states that "[t]he Congress shall have Power ***** To regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, section 8, cl. 3. While the Commerce Clause represents an affirmative grant of power to Congress, it has long been held to impliedly contain a negative command to the states that states cannot, through the enactment of statutes or regulations, discriminate against or unduly burden interstate commerce. *Quill*, 504 U.S. at 312. This implied negative command is known as the "dormant" Commerce Clause. *Id.*; *see also*

Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 178 (1995). In determining whether application of Minnesota's nondomiciliary resident statute discriminates against or unduly burdens interstate commerce, we first determine whether application of the nondomiciliary resident statute implicates the Commerce Clause at all. *See United States v. Lopez*, 514 U.S. 549, 559 (1995); *Tamagni v. Tax Appeals Tribunal*, 695 N.E.2d 1125, 1131 (N.Y. 1998). If application of the statute does implicate the Commerce Clause, then we must determine whether the Commerce Clause is violated by such application. *See Tamagni*, 695 N.E.2d at 1133.

A. *Implication of the Commerce Clause*

For the Commerce Clause to be implicated, application of Minnesota's statute must substantially affect interstate commerce, i.e., interstate economic activity. *Lopez*, 514 U.S. at 559, 567; *Tamagni*, 596 N.E.2d at 1130. Commerce is defined as "the commercial intercourse between nations, and parts of nations, in all its branches." *Lopez*, 514 U.S. at 553 (citation and internal quotation omitted). The purpose of the dormant Commerce Clause is not "to protect state residents from their own state taxes." *Goldberg v. Sweet*, 488 U.S. 252, 266 (1989). Instead, "[t]he dormant Commerce Clause protects markets and participants in markets." *General Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997). Thus, Luther must initially show that application of Minnesota's statute has a substantial effect on an identifiable interstate economic activity or market.

Luther argues that application of Minnesota's nondomiciliary resident statute amounts to a tax on interstate commerce and, specifically, her right under the Commerce Clause to interstate travel. In support of her argument that her right to interstate travel is violated, Luther cites *United States v. Guest*, 383 U.S. 745 (1966), and *Edwards v. California*,

314 U.S. 160 (1941). Her reliance on these two cases, however, is misplaced.

In *Guest*, the Supreme Court was asked to determine whether the right to interstate travel was encompassed in a federal conspiracy statute. *See Guest*, 383 U.S. at 747, 757. The court did not address directly whether the alleged conspiracy to deprive African-Americans of their fundamental right to travel violated the Commerce Clause. Thus, *Guest* is inapplicable to our present Commerce Clause-based analysis. The second case on which Luther relies, *Edwards*, was a Commerce Clause case involving interstate travel. In *Edwards*, the United States Supreme Court struck down a California statute that made it a crime to transport indigents into the state. *Edwards*, 314 U.S. at 177. The proposition for which Edwards stands, however, is not analogous to Luther's case. In *Edwards*, the transportation of indigents across state lines implicated the protection of the Commerce Clause. *See id.* at 174. Here, it is not Luther's movement across state lines that is being taxed. Instead, Luther was required to pay Minnesota income tax on her net worldwide income because, through her substantial contacts with Minnesota, she availed herself of the many services, benefits, and protections provided to her by Minnesota. The requirement that she pay Minnesota income tax was triggered by conduct that took place wholly within Minnesota and that did not substantially affect interstate commerce. Therefore, we conclude that her reliance on Edwards to support her claim that her right to interstate travel has been violated is misplaced.

Luther also argues that the constitutional protections of the Commerce Clause are implicated because application of Minnesota's nondomiciliary resident statute taxes income she received from the Florida-based Morris L. Gordon Family Trust. In this argument, Luther appears to contend that the interstate activity taxed by application of the statute is her derivation of income from investment activities that were

performed in Florida. Luther's argument fails because it flies in the face of a well-established doctrine concerning taxation of intangible income and does not recognize the basis for Minnesota's tax. The well-established doctrine of mobilia sequuntur personam ("movables follow the [law of the] person") has long been cited as standing for the proposition that intangible assets, such as Luther's trust income, have no identifiable situs for tax purposes. *See Delaware v. New York*, 507 U.S. 490, 503 (1993); *Curry*, 307 U.S. at 363 n.1, 366. Thus, the ownership of intangible assets and income derived from that ownership follow the beneficial owner wherever she goes and may, in proper situations, be taxed in multiple jurisdictions. *Id.* Minnesota taxed Luther's income, the bulk of which was intangible income, on the basis that she availed herself, through substantial contacts with the state, of the services, benefits, and protections Minnesota provided to her. These substantial contacts with Minnesota-maintenance of an abode in Minnesota and presence in Minnesota for more than one-half of the tax year-represent activity that takes place wholly within Minnesota and does not substantially affect interstate commerce. The contacts provide an adequate basis for Minnesota to tax Luther's worldwide net income. Thus, we conclude that application of the nondomiciliary resident statute does not substantially affect interstate commerce. Accordingly, we hold that the Commerce Clause is not implicated in this case.

Because we hold that the Commerce Clause is not implicated through application of the nondomiciliary resident statute, we need not decide whether the nondomiciliary resident statute is constitutional under the Commerce Clause.

Affirmed.

STATE OF MINNESOTA TAX COURT

COUNTY OF RAMSEY REGULAR DIVISION

Adelyn L. Luther,

Appellant,

NOTICE OF ENTRY OF ORDER

vs.

Commissioner of Revenue, Docket No. 6746

Appellee.

TO:

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YOU WILL PLEASE TAKE NOTICE that the Tax Court made, filed and entered the attached Order on January 27, 1998.

Dated at St. Paul, Minnesota this 27th day of January, 1998.

MINNESOTA TAX COURT

BY /s/ Lisa M. Schmidt
Lisa M. Schmidt
Deputy Clerk

STATE OF MINNESOTA — TAX COURT

COUNTY OF RAMSEY — REGULAR DIVISION

Adelyn L. Luther,

Appellant,

vs.

Commissioner of Revenue,

Appellee.

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT OF ORDER

Docket No. 6746

Dated: January 27, 1999

This matter was heard by the Honorable Kathleen Doar, Chief Judge of the Minnesota Tax Court, on September 16, 1997, at the Minnesota Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota.

David R. Brennan, Attorney at Law, represented the Appellant.

Michele M. Owen, Assistant Attorney General, appeared for the Appellee.

The issues in this case are: (1) whether Adelyn Luther was a resident of Minnesota in 1990 within the meaning of Minn. Stat. § 290.01, subd. 7; and, if so (2) whether, Minn. Stat. § 290.01, subd. 7 is constitutional.

Post-trial briefs were filed by both parties and the matter was submitted to the Court for decision on November 3, 1997.

The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

FINDINGS OF FACT

1. Adelyn L. Luther ("Appellant") has been a resident and domiciliary of Florida since 1987.

2. In 1990 Appellant owned a single family dwelling at 9705 Oak Ridge Trail in Minnetonka, Minnesota. She also owned dwellings in Florida, Hawaii and Montana.

3. In 1990 Appellant followed her usual pattern and resided in Minnesota from early May to early November. When she left Minnesota in November she closed her Minnetonka home and did not use it again until the spring of 1991.

4. Appellant is a director and shareholder of Cardinal Glass Company, a Minnesota Subchapter S corporation ("Cardinal Glass"). During 1990 she attended Cardinal Glass shareholder and director meetings in Minnesota in March, July and December.

5. Appellant attended the July Cardinal Glass meetings from her Minnetonka home and returned to Minnesota from Florida to attend the March and December meetings. Appellant stayed at the Minneapolis Marriott Hotel when she was in town for the March and December 1990 meetings because her Minnesota residence was closed for the winter.

6. Cardinal Glass meetings were held on Saturday with a brunch meeting on Sunday. In March and December Appellant traveled from Florida to Minnesota on the Friday before the meeting. She did not return to Florida on the Sunday evening following the meetings because the only flight available on those evenings did not arrive in Florida until nearly midnight. While Appellant intended to return to Florida on the Monday following the March and December meetings, she missed the Monday morning flight and returned to Florida on Tuesday.

7. Appellant spent 189 days in Minnesota during 1990 including travel days. She spent 193 days outside of Minnesota during 1990 including travel days.

8. Appellant's 1990 adjusted gross income was $3,271,761.

9. Appellant filed a 1990 Minnesota Income Tax Return as a nonresident. She reported income of $308,636 in 1990 sourced to Minnesota in accordance with Minn. Stat. § 290.17, subd. 2. The parties agree that the correct income sourced to Minnesota in 1990 was $340,767.

10. The Commissioner of Revenue (the "Commissioner") determined that Appellant was a Minnesota resident in 1990 and, on January 11, 1996, issued an Order assessing income tax on all of her 1990 income.

11. Appellant filed this appeal.

CONCLUSIONS OF LAW

1. Appellant was a resident of Minnesota in 1990 within the meaning of Minn. Stat. § 290.01, subd. 7.

2. Minn. Stat. § 290.01, subd. 7 does not violate the United States Constitution.

3. The Order of the Commissioner dated January 11, 1996 is affirmed.

LET JUDGMENT BE ENTERED ACCORDINGLY. THIS IS A FINAL ORDER. A STAY OF 15 DAYS IS HEREBY ORDERED.

BY THE COURT,

/s/ Kathleen Doar
Kathleen Doar, Chief Judge
MINNESOTA TAX COURT

DATED: January 27, 1998

MEMORANDUM

During 1990, the year at issue in this appeal, Appellant was a Florida resident and domiciliary who owned dwellings in Florida, Minnesota, Hawaii and Montana. In 1990 she followed her usual pattern and lived in Minnesota from early May until early November. When she left Minnesota in November she closed her Minnesota home for the winter.

Appellant is a shareholder and director of Cardinal Glass. During 1990 she attended Cardinal Glass shareholder and director meetings in March, July and December. Appellant attended the July Cardinal Glass meetings from her Minnetonka home and returned to Minnesota from Florida to attend the March and December meetings. Appellant stayed at the Minneapolis Marriott Hotel when she was in town for the March and December 1990 meetings because her Minnesota residence was closed for the winter.

Cardinal Glass meetings were held on Saturday with a brunch meeting on Sunday. In March and December Appellant traveled from Florida to Minnesota on the Friday before the meeting. She did not return to Florida on the Sunday evening following the meetings because the only flight available on those evenings did not arrive in Florida until nearly midnight. While Appellant intended to return to Florida on the Monday following the March and December meetings, she missed the Monday morning flight and returned to Florida on Tuesday.

The issue in this case is whether Appellant was a Minnesota resident[1] in 1990 within the meaning of Minn. Stat. § 290.01, subd. 7 (2) which reads in relevant part as follows:

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[1] Minnesota law provides that all of the income of a resident is taxable in Minnesota while the income of a nonresident is subject to allocation. Minn. Stat. § 290.17.

> The term "resident" means ... any individual domiciled outside the state who maintains a place of abode in the state and spends in the aggregate more than one-half of the tax year in Minnesota....
>
> For purposes of this subdivision, presence within the state for any part of a calendar day constitutes a day spent in the state.
>
> The term "abode" means a dwelling maintained by an individual, whether or not owned by the individual and whether or not occupied by the individual.

(the "Resident Definition").

We address two questions: (1) Was Appellant a Minnesota resident in 1990 within the meaning of the Resident Definition? and (2) If so, is the law constitutional?

Statutory Interpretation.

Appellant maintained an "abode" in Minnesota in 1990 and spent 189[2] days in Minnesota during the year. Appellant argues however that she did not spend "more than one-half the 1990 tax year" in Minnesota because: (1) the March and December travel and meeting days were temporary stays within the meaning of Minn. R. 8001.0300 subp. 4 and should not be counted as days in Minnesota for purposes of the Resident Definition; and (2) she spent more days outside of Minnesota (counting travel days as a day in Minnesota as well as a day outside of Minnesota) than in Minnesota.

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[2] The parties stipulated that Mrs. Luther was in Minnesota a total of 189 days, including travel days. However counsel for Mrs. Luther indicates in his initial brief that the correct number is 190 days. We do not understand the error pointed out by counsel but conclude that it makes no difference.

Minn. R. 8001.0300 subp. 4 provides as follows:

> **Days within and days without Minnesota.** In counting the number of days spent in Minnesota, a person shall be treated as present in Minnesota on any day if the person is physically present in Minnesota at any time during that day. However, a person in transit between two points outside Minnesota who is physically present in Minnesota less than 24 hours, will not be treated as present in Minnesota on any day during transit.

(the "Transit Rule").

The Transit Rule provides that a physical presence in Minnesota will not be counted as a day spent in the state for purposes of the Resident Definition if a person is in transit between two non-Minnesota points and the stay in Minnesota is for less than twenty-four hours. Appellant's March and December 1990 **destination** was Minnesota. We therefore agree with the Commissioner that those days must be counted as days spent in the state.

Appellant argues that the "more than one-half the tax year" language included in the Resident Definition requires a comparison of days spent in and out of Minnesota. Because she spent more days out of the state than in the state (193 versus 189), she argues she spent "more than one-half the tax year" outside the state. We read the "more than" language to mean more than one-half of the days of a year i.e. more than 183 days. Because Appellant spent more than one-half of the days in 1990 in Minnesota, we find her a resident of the state within the meaning of the Resident Definition.

Constitutional Questions.

I. Due Process Clause. The Fourteenth Amendment to the United States Constitution provides that no state shall

deprive a person of property "without due process of law..." (the "Due Process Clause"). Generally the Due Process Clause prohibits a state from imposing a tax on out of state activities. Frick v. Pennsylvania, 268 U.S. 472 (1925). However, a state may tax certain persons on income earned anywhere in the world:

> The obligation of one domiciled within a state to pay taxes there, arises from the unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits. Hence, domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government.

Lawrence v. State Tax Commission, 286 U.S. 276, 279 (1932), see also New York ex rel. Cohn v. Graves, 300 U.S. 308 (1937).

The United States Supreme Court did not define the terms "residence" and "domicile" when it set forth the rule that a state may tax all of the income of those persons who benefit from the protection of the state. In fact, as quoted above, it used the terms interchangeably. The Minnesota Supreme Court has also used the words interchangeably: "It is well settled that a state may constitutionally tax a resident or a domestic corporation on income derived from sources outside of the state ..." Bolier v. Commissioner of Taxation, 45 N.W.2d 802, 804 (Minn. 1951). See also Hillstrom v. Commissioner of Revenue, 270 N.W.2d 265 (Minn. 1978) ("domicile" and "citizen").

Appellant rests her argument that the Resident Definition violates the Due Process Clause upon the fact that she is a

Florida domiciliary. Because she is domiciled in Florida, she argues, Florida is the only state that may tax all of her income. While we agree that there is a legal distinction between the term "resident" and "domiciliary" and that a person may have only one domicile (if that term is understood to include intent),[3] we disagree that the Due Process Clause prohibits residency in more than one state.

We reach this conclusion following a review of the philosophical underpinnings for the rule that a state may tax all of the income of "residents" or "domiciles". When it articulated the rule the United States Supreme Court looked to the relationship between the taxpayer and the taxing state and to whether the taxpayer had sufficient contact with the taxing state to justify the imposition of tax.[4] The relevant inquiry is whether the Residence Definition requires sufficient contact with the state so that an individual who meets the statutory definition has availed herself of the benefits and protection offered by the state.

The Resident Definition requires both a dwelling in and extensive contact with the state i.e. presence in the state for more than one-half the tax year. Clearly a person meeting the definition has availed herself of the protection of the laws of the state. We find no violation of the Due Process Clause.

II. The Commerce Clause. The United States Constitution grants Congress the power "to regulate commerce with foreign nations, and among the States." U.S. Const. art. I, § 8, cl. 3 (the "Commerce Clause"). Although it

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[3] The term "domicile" means the bodily presence of an individual person in a place coupled with an intent to make such a place one's home. Minn. R. 8001.0300 subp. 2.

[4] We assume that in the 1930's when Lawrence and Cohn were decided the physical residence of a taxpayer and the taxpayer's intended domicile were the same. In 1990 however, with the ease of world movement, it is entirely possible to reside in many places in addition to one's domicile.

speaks of a Congressional grant of power, the Commerce Clause limits a state's power to erect barriers against interstate commerce. A state may tax interstate commerce if the tax: (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

Appellant argues that the Resident Definition violates the first, second and fourth prong of the Complete Auto test because it allows Minnesota to tax all of her income despite the fact that the business decisions generating the income occurred outside the state.[5] Appellant also argues that the Resident Definition violates the third prong of the Complete Auto test because it leads to multiple taxation.

First, we agree with Appellant that her movement between states constitutes interstate travel within the meaning of the Commerce Clause. However, we disagree that the Resident Definition violates the Commerce Clause. The first, second and fourth prongs of the Complete Auto test address the question of whether the taxpayer's contact with Minnesota is sufficient to justify the tax. The analysis supporting our Due Process Clause discussion clearly indicates that the Resident Definition requires significant contact with the state.

The third prong of the Complete Auto test focuses on whether interstate commerce is subject to the risk of multiple taxation. Appellant was subject to the Minnesota income tax in 1990 and, as a domiciliary of Florida, was subject to an ad valorem tax on the value of intangibles.[6] Appellant was not required to pay the **same** tax to more than one taxing

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[5] The parties agree that the income earned by Appellant in 1990, not sourced to Minnesota (see Finding of Fact No. 10), was earned by a trust managed by the Barnet Bank in Florida.

[6] Appellant paid a tax of $2,829 ($1.00 per $1,000 of intangible property) to Florida in 1990.

authority however, because Minnesota and Florida imposed different taxes. See Goldberg v. Sweet, 488 U.S. 252, 261-262 (1989). Additionally, if Florida had imposed an income tax, Minnesota law provides a credit for income tax paid to other states. Minn. Stat. § 290.06, subd. 22. Appellant therefore faced no **risk** of multiple taxation.

Because we find Appellant a resident of Minnesota within the meaning of the Resident Definition and find the statute in compliance with the Due Process Clause and Commerce Clause, we affirm the Commissioner's Order.

K.D.

STATE OF MINNESOTA

☒ **Supreme Court**
☐ **Court of Appeals**

Adelyn L. Luther,

Relator,

JUDGMENT

C0-98-406

vs.

Appellate Court Case Number

Commissioner of Revenue,

Trial Court Case Number

Respondent.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the decision of the Minnesota Tax Court filed January 27, 1998 *be and same hereby is* affirmed

and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.

Dated and signed: FOR THE COURT March 15, 1999
Dated

By: /s/ Wendy Johnson
Assistant Clerk

STATE OF MINNESOTA

☒ **Supreme Court**
☐ **Court of Appeals**

TRANSCRIPT OF JUDGMENT

I do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears form the original record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the State Capitol,

in the City of St. Paul March 15, 1999
Dated

By: /s/ Wendy Johnson
Assistant Clerk

Minn. Stat. § 290.01, subd. 7 (1990)

290.01 DEFINITIONS

Subd. 7. **Resident**. The term "resident" means (1) any individual domiciled in Minnesota, except that an individual is not a "resident" for the period of time that the individual is a "qualified individual" as defined in section 911(d)(1) of the Internal Revenue Code of 1986, as amended through December 31, 1989, unless, during that period, a Minnesota homestead application is filed for property in which the individual has an interest; and (2) any individual domiciled outside the state who maintains a place of abode in the state and spends in the aggregate more than one-half of the tax year in Minnesota, unless the individual or the spouse of the individual is in the armed forces of the United States, or the individual is covered under the reciprocity provisions in section 290.081.

For purposes of this subdivision, presence within the state for any part of a calendar day constitutes a day spent in the state. Individuals shall keep adequate records to substantiate the days spent outside the state.

The term "abode" means a dwelling maintained by an individual, whether or not owned by the individual and whether or not occupied by the individual, and includes a dwelling place owned or leased by the individual's spouse.

Minn. Stat. § 290.06, subd. 22 (1990)

290.06 RATES OF TAX; CREDITS

Subd. 22. **Credit for taxes paid to another state**. (a) A taxpayer who is liable for taxes on or measured by net income to another state or province or territory of Canada, as provided in paragraphs (b) through (f), upon income allocated or apportioned to Minnesota, is entitled to a credit for the tax

paid to another state or province or territory of Canada if the tax is actually paid in the taxable year or a subsequent taxable year. A taxpayer who is a resident of this state pursuant to section 290.01, subdivision 7, clause (2), and who is subject to income tax as a resident in the state of the individual's domicile is not allowed this credit unless the state of domicile does not allow a similar credit.

(b) For an individual, estate, or trust, the credit is determined by multiplying the tax payable under this chapter by the ratio derived by dividing the income subject to tax in the other state or province or territory of Canada that is also subject to tax in Minnesota while a resident of Minnesota by the taxpayer's federal adjusted gross income, as defined in section 62 of the Internal Revenue Code of 1986, as amended through December 31, 1989, modified by the addition required by section 290.01, subdivision 19a, clause (1), and the subtraction allowed by section 290.01, subdivision 19b, clause (1), to the extent the income is allocated or assigned to Minnesota under sections 290.081 and 290.17.

(d) The credit determined under paragraph (b) or (c) shall not exceed the amount of tax so paid to the other state or province or territory of Canada on the gross income earned within the other state or province or territory of Canada subject to tax under this chapter, nor shall the allowance of the credit reduce the taxes paid under this chapter to an amount less than what would be assessed if such income amount was excluded from taxable net income.

Minn. Stat. § 290.17 (1990), subd. 1

290.17 GROSS INCOME, ALLOCATION TO STATE.

Subdivision 1. **Scope of allocation rules.** (a) The income of resident individuals is not subject to allocation outside this state. The allocation rules apply to nonresident individuals, estates, trusts, nonresident partners of

partnerships, nonresident shareholders of corporations having a valid election in effect under section 1362 of the Internal Revenue Code of 1986, as amended through December 31, 1989, and all corporations not having such an election in effect. If a partnership or corporation would not otherwise be subject to the allocation rules, but conducts a trade or business that is part of a unitary business involving another legal entity that is subject to the allocation rules.

Supreme Court, U.S.
FILED
JUL 14 1999
OFFICE OF THE CLERK

No. 98-1999

In The

Supreme Court of the United States

ADELYN L. LUTHER,

Petitioner,

v.

COMMISSIONER OF REVENUE,

Respondent.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does Minnesota's taxation of the entire net income of a nondomiciliary resident who maintains an abode in the State, spends in the aggregate more than one-half of the tax year in the State, and has substantial financial interests located in the State, violate the Due Process Clause of the United States Constitution?

2. Does the imposition of Minnesota's individual income tax on the entire net income of a nondomiciliary resident who maintains a place of abode in Minnesota and spends more than one-half of the tax year in Minnesota implicate the Commerce Clause of the United States Constitution?

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Tamagni v. Tax Appeals Tribunal, 695 N.E.2d 1125 (N.Y.), cert. denied, ___ U.S. ___, 119 S. Ct. 340 (1998) 10, 15, 17

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Commerce Clause (U.S. Const. art. I, § 8, cl. 3) ..... *passim*

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OTHER AUTHORITIES

Seth Goldstein, Note, "Resident" Taxpayers: Internal Consistency, Due Process, and State Income Taxation, 91 COLUM. L. REV. 119 (1991) 4

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Commissioner of Revenue respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the Supreme Court of Minnesota in this case. The opinion of the Minnesota Supreme Court is reported at 588 N.W.2d 502 (1999), and is reproduced in the Petitioner's Petition for Writ of Certiorari at App. A-1. The opinion of the Minnesota Tax Court is reported in Westlaw. *See Luther v. Commissioner of Revenue*, No. 6746, 1999 WL 37496 (Minn. T.C. Jan. 27, 1999). The tax court opinion is also reproduced in the Petition for Writ of Certiorari at App. A-21.

STATEMENT OF THE CASE

Respondent adopts the Minnesota Supreme Court's description of this case as it appears in 588 N.W.2d at 504 – 06 and at App. A-2 – A-7, and Respondent accepts the Statement of the Petitioner at pages 2-4 of the Petition as being generally accurate. However, Respondent notes in addition that, although not clearly acknowledged in the Petition, it is undisputed Petitioner was physically present in Minnesota on 189 separate days during the 1990 tax year in issue. 588 N.W.2d at 507, App. A-8. During eighteen of those days, which the Minnesota Supreme Court referred to as "travel days," she either arrived in or departed from Minnesota. 588 N.W.2d at 505, App. A-4. Minnesota law treats an individual's presence in Minnesota for any portion of a day as a day spent in Minnesota for purposes of computing whether the individual spent

more than one-half of a tax year in Minnesota.[1] The correctness of the Minnesota Supreme Court's determination, in applying Minnesota law, that Petitioner spent more than one-half of the 1990 tax year in Minnesota, is not presented to this Court by the Petition for Writ of Certiorari. This "computational" issue is relevant only to the extent that it bears on the questions presented by Petitioner's Due Process or Commerce Clause Claims.[2]

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[1] An administrative rule, which has the force and effect of law in Minnesota, excludes from the computation of Minnesota days any period of less than 24 hours spent in Minnesota when the individual is in transit between two points outside of Minnesota. 588 N.W.2d at 507-08, App. A-9 – A-10; *see* Minn. Stat. §§ 14.38, subd. 1, 270.06(13) (1990). The rule did not apply to exclude any of Petitioner's eighteen travel days from the computation of days spent in Minnesota, because in all cases she was either traveling to Minnesota, as her destination, or departing from Minnesota, after a stay of substantially more than 24 hours. 588 N.W.2d at 508, App. A-10; *see* Minn. R. 8001.0300, subpt. 4 (1989).

[2] The introductory paragraphs preceding Petitioner's statement of the Questions Presented (Pet. at i), characterize Minnesota law as imposing an income tax on *all* the income of individuals domiciled in Minnesota and, generally, only on the *Minnesota-source income* of individuals domiciled elsewhere. This statement creates the erroneous impression that the Minnesota tax is imposed on the basis of domicile, rather than residency. More precisely, as is acknowledged expressly elsewhere in the Petition, Minnesota law imposes a tax on all the income of Minnesota "residents," whether or not they are Minnesota domiciliaries, and only on the Minnesota-source income of "non-residents." *See* Petition at 2-3. Domicile is but one of the tests for determining residency in Minnesota under Minnesota law. *See* Minn. Stat. § 290.01, subd. 7 (1990).

REASONS FOR DENYING THE PETITION

There is no reason for the Court to grant review in this case. The decision of the Minnesota Supreme Court is not contrary to the decisions of this Court, or to those of any other state court of last resort, or to those of a United States Court of Appeals. Nor do the facts of this case present an important question of federal law that has not been, but should be, settled by this Court. Petitioner has demonstrated no need for the Court to clarify or reexamine the well-established rationale for state taxation of the income its residents earn from all sources under *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937), *Lawrence v. State Tax Commissioner*, 286 U.S. 276 (1932), and *Maguire v. Trefry*, 253 U.S. 12 (1920). *See Guaranty Trust Company v. Virginia*, 305 U.S. 19 (1938) (income from out-of-state trust taxable by beneficiary's state of residence). This is particularly so where Minnesota, the state of residence, provides a credit for income taxes paid to the resident taxpayer's state of domicile, thus avoiding any potential risk of double taxation by the state of domicile. 588 N.W.2d at 510, App. A-14; *see* Minn. Stat. § 290.06, subd. 22 (1990) (App. A-33).

Nor does the Petition frame any federal question which it is necessary for this Court to resolve to guide the states in the maintenance of their income tax systems. Given the wide latitude accorded to the states in the determination of their tax schemes in our federal system, *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940), this case presents no compelling reason for the reexamination of the fundamental basis for a state's income taxing authority with respect to its residents. As Petitioner

points out, at least twenty-three other states employ statutes defining nondomiciliary residents in a manner similar to Minnesota law.[3] Petition at 6 and note 4. Yet, Petitioner has not presented any evidence of a division among state courts on the issues raised by the Petition, and Respondent is not aware of any.

I. Petitioner Has Failed To Establish That Minnesota's Imposition Of Tax On The Entire Net Income Of Nondomiciliary Residents Violates The Due Process Clause.

Petitioner asserts that Minnesota's taxation of her entire net income, as a nondomiciliary resident of the State, violates the Due Process Clause. In arguing her position, Petitioner does not apply the standards established by this Court to determine the constitutionality of an individual income tax. Rather, Petitioner relies heavily on state corporate tax cases involving the issue of taxable "business income" versus exempt "nonbusiness income." In contrast, the court below properly applied the principles applicable to individual income tax cases and correctly determined that the tax at issue in this case does not offend the Due Process Clause.

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[3] Indeed, it has been noted that only a handful of states limit their definition of "resident" to persons domiciled in the state. Seth Goldstein, Note, "Resident" Taxpayers: Internal Consistency, Due Process, and State Income Taxation, 91 COLUM. L. REV. 119, 122 n.19 (1991).

A. The Minnesota Supreme Court Applied The Proper Constitutional Standards And Correctly Decided The Due Process Issue.

This Court has established a two-pronged inquiry for due process issues in state tax cases: (1) whether there is "some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax;" and (2) whether the "income attributed to the State for tax purposes [is] related to 'values connected with the taxing State.' " *Quill Corporation v. North Dakota*, 504 U.S. 298, 306 (1992) (citations and internal quotation omitted).

In concluding that the facts in this case satisfy the first prong of the *Quill* test, the Minnesota Supreme Court observed that Petitioner both spent a substantial period of time in Minnesota during the tax year in question and maintained a place of abode in the State during that period. 588 N.W.2d at 508-09. Holding that the facts also satisfy the second prong of the *Quill* test, the court below relied on Petitioner's acceptance and enjoyment of the many services, benefits, and protections Minnesota afforded her person, property, and financial interests during the tax year in issue. *Id.* at 509. The court properly found that Minnesota's requirement that Petitioner contribute to the costs of government associated with providing those services, benefits, and protections satisfies due process because it is rationally related to her receipt thereof. *Id.*

B. Petitioner's Due Process Arguments Provide No Reason For Review.

Petitioner makes two main arguments in support of her position that the decision of the Minnesota Supreme Court on the due process issue is incorrect. First, Petitioner relies on this Court's line of state corporate tax cases standing for the proposition that a state may not constitutionally tax income from transactions having an out-of-state situs if they serve merely an investment, as distinguished from an operational, function. *See, e.g., Allied Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 787 (1992). Second, Petitioner contends that application of the Due Process Clause to state individual income tax statutes prohibits taxation of income from intangibles located outside the taxing state, unless the taxpayer is *domiciled* in the taxing state. Petition at 7-13. Neither of these arguments finds support in the decisions of this Court determining the authority of states to impose individual income taxes within the parameters of the Due Process Clause.

The court below properly rejected Petitioner's reliance on state corporate tax cases, observing that there is no due process requirement that corporations and individuals be treated exactly the same for tax purposes, and in the absence of arbitrary distinctions, the due process concern with the possibility of multiple taxation in corporate tax cases is not present in connection with individual taxpayers. 588 N.W.2d at 509-10, App. A-13 – A-14. *See Lawrence v. State Tax Commissioner*, 286 U.S. 276, 283 (1932); *Shaffer v. Carter*, 252 U.S. 37, 58 (1920). For these reasons, the corporate tax cases relied upon by Petitioner,

which are concerned with the apportionment of operational business income, as distinguished from investment income, have no application to this case. In any event, as the court below pointed out, there is no risk of multiple taxation in this case because Minnesota provides a credit for income tax paid to a nondomiciliary resident's state of domicile. 588 N.W.2d at 510, App. A-14; *see* Minn. Stat. § 290.06, subd. 22(a) (1990).

In addition to rejecting Petitioner's mistaken reliance on state corporate tax cases, the court below correctly rejected her contention that under the Due Process Clause the taxation of income derived from out-of-state intangibles is limited to taxpayers *domiciled* within the taxing state. 588 N.W.2d at 510, App. A-14 – A-15. While the decisions relied upon by Petitioner as support for this contention involved taxpayers who apparently were domiciliaries of the taxing states, they were not grounded on the domiciliary status of the taxpayers. Rather, the reasoning of this Court in deciding those cases[4] also applies to nondomiciliary residents of a taxing state, such as Petitioner, whose substantial connections with Minnesota clearly are sufficient to satisfy the first requirement of due process analysis, and whose enjoyment of the numerous benefits and protections provided by the State satisfies the second requirement of that analysis. Indeed, as Petitioner notes, the Court, in a number of decisions pertinent to the issues in this case, has routinely

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[4] *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937); *Lawrence v. State Tax Commissioner*, 286 U.S. 276 (1932); *Maguire v. Trefry*, 253 U.S. 12 (1920).

employed the terms "domicile" and "residence" interchangeably, drawing no distinction between their technical differences in meaning.[5] Petition at 5, note 3. At the same time, the Court has repeatedly emphasized that the constitutionality of taxing an individual's income from intangibles, on facts akin to the facts in this case, rests not on fine legal distinctions but on the realities of benefits and protections afforded the individual by the taxing state. *See, e.g., Maguire v. Trefry*, 253 U.S. 12, 14 (1920). As this Court has stated with respect to its analysis of constitutional questions generally:

> The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it

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[5] Petitioner's discussion of the doctrine of *mobilia sequuntur personam* (movables follow the [law of the] person) in connection with the Minnesota Supreme Court's holding on the Due Process Clause issue, Petition at 10, is misdirected. The court below referred to that doctrine only in connection with the Commerce Clause issue. 588 N.W.2d at 511-12, App. A-18. In any event, by its express language, the doctrine is not limited to domiciliaries of a state and was properly applied by the lower court in this case involving a nondomiciliary resident of a state.

> has conferred by the fact of being an orderly, civilized society.

Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940).

In deciding this case, the Minnesota Supreme Court properly applied the standards established by this Court for the determination of constitutional questions and correctly held that the statute in issue does not offend the Due Process Clause. For that reason, and because Petitioner has not shown any conflict among lower courts respecting the due process issue in this case, there is no reason for this Court to undertake review of the holding of the court below on that issue.

II. The Minnesota Supreme Court's Holding That The Taxation Of Petitioner's Entire Net Income On The Basis Of Her Minnesota Residency Does Not Implicate The Commerce Clause Does Not Warrant Review.

Petitioner also argues that the Minnesota Supreme Court erred when it determined that Minnesota's imposition of its income tax on nondomiciliary residents does not implicate the Commerce Clause. In holding that the Commerce Clause is not implicated, the court below observed that Petitioner 'must initially show that application of Minnesota's [nondomiciliary resident] statute has a substantial effect on an identifiable interstate economic activity or market.' 588 N.W.2d at 511, App. A-16. In determining that the application of Minnesota's statute does not have such an effect, the lower court first observed that the tax was not imposed as a result of Petitioner's movement across state lines, but as a result of

significant presence in Minnesota which qualified her as a nondomiciliary resident of the State. 588 N.W.2d at 511, App. A-17. The court said:

> [Petitioner] was required to pay Minnesota income tax on her net worldwide income because, through her substantial contacts with Minnesota, she availed herself of the many services, benefits, and protections provided to her by Minnesota. The requirement that she pay Minnesota income tax was triggered by conduct that took place wholly within Minnesota and that did not substantially affect interstate commerce.

Id.

The Minnesota Supreme Court's decision that application of Minnesota's nondomiciliary residency statute to Petitioner does not implicate the Commerce Clause is consistent with the recent decision of the New York Court of Appeals in *Tamagni v. Tax Appeals Tribunal*, which this Court declined to review. 695 N.E.2d 1125 (N.Y.), *cert. denied*, ___ U.S. ___, 119 S. Ct. 340 (1998). Although there are factual distinctions between that case and this, the New York case presented a separate basis for Commerce Clause scrutiny that is not presented by the Petition – the potential for double taxation, by New York and New Jersey, of the taxpayers' income from intangible property. Unlike Minnesota, New York did not allow a credit to taxpayers for tax paid to other states with respect to intangible income having no identifiable situs. *See Tamagni*, 695 N.E.2d at 1129. Minnesota expressly provides a credit for taxpayers, such as the Petitioner, where an

income tax upon the same income subject to tax by Minnesota has been paid to another state. *See* Minn. Stat. § 290.06, subd. 22 (1990).

In attempting to show that the facts of this case implicate the Commerce Clause, Petitioner revisits her state law statutory construction argument to the effect that the eighteen "travel days" should be treated as days spent both within and outside Minnesota. Petition at 15. That state law argument was rejected by the Minnesota Supreme Court and is not on appeal to this Court. *See* 588 N.W.2d at 507, App. A-8 – A-9. Respondent notes, however, that the Minnesota statute takes a reasonable approach to resolving the computational problem of determining whether a taxpayer resided in the state for more than one-half of a tax year. It resolves this problem by counting the "days" the taxpayer spent in Minnesota, and by treating any part of a "day" in Minnesota as a Minnesota day.[6] Since most taxpayers will be able to maintain diaries, showing where they spent a given day, the use of "days" is reasonable.[7] Petitioner's objections to Minnesota's choice of a reasonable computational method

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[6] It is unclear whether Petitioner would find Commerce Clause problems with a system which divided the tax year into "hours" or "minutes" or "seconds" in Minnesota, with the attendant bookkeeping problems. Nor is it clear from the record of this case whether Petitioner actually spent more or less than one-half of the hours in any of the disputed 18 travel days in Minnesota.

[7] Nor is Minnesota alone in its treatment of any portion of a day in Minnesota as "a day" in the state. *See, e.g., Leach v. Chu*, 540 N.Y.S. 2d 596, 597 (N.Y. App. Div. 1989).

ultimately border on the trivial and do not rise to a level sufficient to require Commerce Clause scrutiny.

Petitioner relies primarily on three decisions of this Court in support of her claim that the Commerce Clause is implicated in this case. Petition at 14-15. As is demonstrated in the following paragraphs, those three decisions are clearly distinguishable from this case.

The first case, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997), involved a Commerce Clause challenge to a discriminatory tax statute described by the Court as "singling out camps that serve mostly in-staters for beneficial tax treatment, and penalizing those camps that do a principally interstate business." 520 U.S. at 576. No such discrimination is effected by the statute at issue in this case, which treats alike all nondomiciliary taxpayers who meet a threshold residency requirement of maintaining an abode and spending more than one-half of a tax year in Minnesota. In *Camps Newfound/Owatonna*, the Court expressly rejected the claim that the Commerce Clause was not implicated. It held the Commerce Clause was applicable because the *in-state camp itself* was clearly a participant in interstate commerce, both as a purchaser and as a provider of goods and services. 520 U.S. at 572-74. The Court did not, however, hold that the *campers* themselves were "articles of commerce" or that they were engaged in interstate commerce when they crossed state lines to attend an out-of-state camp, which would be closer to the Petitioner's claim in this case. *Id.*

Petitioner also claims the Commerce Clause is implicated based on *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), which was also relied on by the Court

in *Camps Newfound/Owatonna* (520 U.S. at 573). This case concerned Congress' efforts under the Civil Rights Act of 1964 to eliminate racial discrimination in public accommodations. 379 U.S. at 250. The Court determined that the Commerce Clause was implicated as a result of "voluminous testimony" before Congress presenting "overwhelming evidence that discrimination by hotels and motels impedes interstate travel." 379 U.S. at 253. There clearly are no facts raised by the Petition to justify a determination that Petitioner, a nondomiciliary resident of Minnesota with substantial property and business interests in the state, as opposed to the hotels or motels where she may stay for her convenience, during her occasional winter returns to Minnesota, is engaged in interstate commerce or substantially impacts interstate commerce.

The last case Petitioner relies on, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), involved a Commerce Clause challenge to a state severance tax. There the Court held that:

> State taxes levied on a "local" activity preceding entry of the goods into interstate commerce may substantially affect interstate commerce, and this effect is the proper focus of Commerce Clause inquiry.

Id. at 616 (citation omitted). This case dealt not with a purely "local" activity, as Petitioner suggests (Petition at 15), but with the timing question of whether activities occurring prior to the point at which goods enter the stream of commerce may "substantially affect interstate commerce." *Id.* There is no relationship between Montana's imposition of a "severance tax" on coal, the burden

of which was largely exported to the rest of the nation, and Minnesota's imposition of an income tax on persons having a substantial presence in Minnesota. Petitioner's "presence" in Minnesota is simply not the subject of a tax that Minnesota seeks to or could "export" to persons in other states in the course of interstate commerce.

Notwithstanding the clear factual distinctions between this case and the decisions relied upon by Petitioner, she argues that the taxation of her entire net income as a nondomiciliary resident serves to unduly burden interstate commerce by impeding her from "pursuing business opportunities requiring a presence in Minnesota," as well as having a negative effect on interstate businesses and the travel industry. Petition at 15-16. Petitioner makes these arguments in purely speculative fashion, without citing any factual data to show that the statute at issue has any impact whatever on interstate commerce. Moreover, as observed in connection with Petitioner's due process argument, Petitioner disregards the fact that Minnesota law provides a credit for income taxes paid to a nondomiciliary resident's state of domicile. *See* Minn. Stat. § 290.06, subd. 22(a) (1990). But for the fact that Petitioner is domiciled in a state which has no individual income tax, she would have received a credit from Minnesota for any tax she paid to Florida on her intangible income. Petitioner's speculation regarding the impact of the Minnesota tax on businesses and hotels notwithstanding, any impact has not been shown to be substantial enough to implicate the Commerce Clause.

Finally, as with her due process claims, Petitioner has failed to show any split in decisions of lower courts relating to similar tax statutes. In fact, the only two

decisions involving similar statutes of which Respondent is aware are in harmony with the Minnesota Supreme Court's decision, inasmuch as they also sustain the constitutionality of the nondomiciliary resident tax laws in question. *See Tamagni v. Tax Appeals Tribunal*, 695 N.E.2d 1125, 1132-33 (N.Y.), *cert. denied*, ___U.S. ___, 119 S. Ct. 340 (1998) (holding statute taxing nondomiciliary commuter residents owning permanent place of abode in state and spending in excess of 183 days in state on their worldwide income does not implicate Commerce Clause); *People ex rel. Ryan v. Lynch*, 186 N.E. 28, 29 (N.Y. 1933) (holding taxation of nondomiciliary's entire net income on basis of permanent abode and residency in state does not present federal constitutional question).

As the Minnesota Supreme Court stated: "The purpose of the dormant Commerce Clause is not 'to protect state residents from their own state taxes.' " 588 N.W.2d at 511, App. A-16, *citing Goldberg v. Sweet*, 488 U.S. 252, 266 (1989). Rather, its purpose is to protect "markets and participants in markets." *Id.*, *citing General Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997). As the Minnesota court further observed, "it is not [Petitioner's] movement across state lines that is being taxed." 588 N.W.2d at 511, App. A-17. Rather, it is because, "through her substantial contacts with Minnesota, she availed herself of the many services, benefits and protections provided to her by Minnesota," that she was taxed on her net worldwide income. *Id.* In short, it is largely because Petitioner chose to reside at her house in Minnesota for a substantial part of the tax year and avail herself of Minnesota's benefits and protections, not because of her two five-day winter trips back to Minnesota, that she is taxable as a Minnesota resident.

This type of personal activity by a taxpayer does not implicate the Commerce Clause, as the Minnesota Supreme Court correctly held. *See United States v. Lopez*, 514 U.S. 549, 559, 567 (1995) (only economic activity which "substantially affects" interstate commerce implicates Commerce Clause).

Because the Minnesota Supreme Court held that the Commerce Clause was not implicated by Minnesota's nondomiciliary resident income tax, it did not address the merits of Petitioner's Commerce Clause arguments.[8] 588 N.W.2d at 512, App. A-18. Respondent argued before the lower court that the Minnesota tax complied with all four prongs of the Commerce Clause test announced in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287 (1977), which provides that a lawful state tax (1) is applied to an activity with a substantial nexus with the state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. Respondent argued below that Petitioner's extensive contacts with Minnesota, where she owned an abode, among other assets, and was physically present on more than one-half of the days in the 1990 tax year, satisfied the first and fourth prongs of the *Complete Auto* test. With respect to the second prong, Respondent argued that the fair apportionment requirement was satisfied by Minnesota's provision of a credit for income tax paid to other states on any income which was also subject to the Minnesota tax and that income

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[8] Petitioner has briefly summarized her lower court arguments with respect to the merits of her Commerce Clause claims at the end of the Petition. Pet. at 17-18.

from intangibles, having no situs in any state, was properly taxed by the state of residency. As to the third prong of the test, Respondent argued that the Minnesota statute's method of counting days spent in Minnesota is a practical and rational means of determining whether an individual has spent more than one-half of a tax year in the state and does not favor intrastate commerce at the expense of interstate commerce. *See Goldberg v. Sweet*, 488 U.S. 252, 266 (1989). Respondent concluded by arguing that Petitioner had a substantial nexus with Minnesota during the tax year, which provided her access to the protections and benefits provided by the State, and was not subject to a risk of multiple taxation by the Minnesota tax.[9]

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[9] In *Tamagni v. Tax Appeals Tribunal*, 695 N.E.2d 1125 (N.Y. 1998), the New York Court of Appeals similarly concluded that the dormant Commerce Clause was not implicated by New York's resident income tax statute. There, however, the court proceeded to an analysis of the tax statute on the assumption that the Commerce Clause might be held applicable. It first determined that because the tax "does not operate to the disadvantage of any identifiable interstate market, it does not violate the dormant Commerce Clause," and it was unnecessary to consider the *Complete Auto* test. 695 N.E.2d at 1131. It then determined that even if it proceeded to an analysis of the tax under *Complete Auto*, the tax was constitutional. 695 N.E.2d at 1133-34.

CONCLUSION

For the reasons presented in this Brief in Opposition, the Petition should be denied.

Respectfully submitted,

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